



September 6, 2000

Mr. John L. Schomburger
Assistant Criminal District Attorney
Collin County Courthouse
210 South McDonald, Suite 324
McKinney, Texas 75069

OR2000-3449

Dear Mr. Schomburger:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 138659.

The Collin County Criminal District Attorney's Office (the "district attorney") received a request for information relating to a case that the district attorney prosecuted. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, and 552.130 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the information you submitted.

We initially note that the district attorney received a previous request, dated November 3, 1999, for five of the seven categories of information that are described in the instant request dated June 21, 2000. Your letter to the requestor of November 11, 1999, indicates that you released some, but not all, of the information that was the subject of the previous request. However, you do not inform this office, and our records do not reflect, that you requested a ruling authorizing you to withhold any information in connection with the previous request. Section 552.301 of the Government Code requires a governmental body that seeks to withhold requested information to ask the attorney general for a decision as to whether that information may be withheld not later than the tenth business day after the date of receiving the written information request. *See* Gov't Code § 552.301(b). When a

¹You also object to the release of "[p]ublished information that the requestor can purchase from the publisher." Under the Public Information Act, a governmental body is not required to permit inspection or copying of a book or publication that is commercially available to the public. *See* Gov't Code § 552.027. However, the submitted records do not appear to contain any commercially published information that is responsive to the records request.

governmental body fails to request a ruling in compliance with section 552.301, the requested information is presumed to be subject to disclosure and must be released, unless there is a compelling reason to withhold any of that information from the public. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); Open Records Decision No. 319 (1982).

Generally, a compelling reason exists where the information at issue is deemed to be confidential under section 552.101 of the Government Code in conjunction with other law. *See* Open Records Decision Nos. 630 at 3 (1994), 150 (1977). In the absence of a demonstration that requested information is confidential by law or that some other compelling reason to withhold the information exists, the requested information must be released. *See* ORD 630 at 3. As sections 552.103, 552.108, and 552.111 are discretionary exceptions to disclosure that a governmental body may waive, your claims under those exceptions do not constitute compelling reasons that rebut the presumption of openness under section 552.302. *Id.*; *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discussing discretionary exceptions). Thus the district attorney may not now withhold, under sections 552.103, 552.108, or 552.111, requested information that also was responsive to the previous information request. *See also* Gov't Code § 552.006. Therefore, except as specified below, the information in question must be released to the requestor.

The submitted information includes records relating to grand jury proceedings. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information that is protected by other statutes. Article 20.02(a) of the Code of Criminal Procedure states that "[t]he proceedings of the grand jury shall be secret." Thus, information that reveals the proceedings of the grand jury is confidential under article 20.02(a) of the Code of Criminal Procedure and therefore is excepted from disclosure under section 552.101 of the Government Code. We have marked the information that we believe is confidential under article 20.02(a) of the Code of Criminal Procedure. You must withhold that information from the requestor. Please note, however, that you must release the grand jury's indictment. *See* Gov't Code § 552.022(a)(17) (providing for required public disclosure of information contained in a public court record).

The requested records also contain criminal history record information ("CHRI") that is confidential under section 552.101 of the Government Code in conjunction with federal and state law. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.") and (c)(2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 of the Government Code provides that any CHRI maintained by the Department of Public Safety (the "DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant

to statute also is confidential and may be disclosed only in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, you must withhold the criminal history record information that we have marked under section 552.101 in conjunction with the foregoing provisions of federal and state law.

The submitted records also include information relating to polygraph examinations that is confidential under section 552.101 in conjunction with section 1703.306 of the Occupations Code. Chapter 1703 of the Occupations Code codifies the Polygraph Examiners Act. *See* Occ. Code § 1703.001. Section 1703.306 of the Occupations Code provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee;

(2) the person that requested the examination;

(3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;

(4) another polygraph examiner in private consultation; or

(5) any other person required by due process of law.

(b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306 (formerly V.T.C.S. art. 4413(29cc) § 19A). We have marked the information that you must withhold under section 552.101 in conjunction with section 1703.306 of the Occupations Code.

Section 552.101 also protects information that is encompassed by the common law right to privacy. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85

(Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). When a governmental body compiles or summarizes local criminal history information pertaining to a particular individual, the compiled or summarized information takes on a character that implicates the individual's right of privacy in a manner that the same information in an uncompiled state does not. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). Thus, section 552.101 requires a law enforcement agency to withhold such locally compiled criminal history information that treats an individual as a suspect, arrestee, or defendant, because the individual's common law right of privacy has been implicated. *Id.*; *see also* Open Records Decision No. 616 at 2-3 (1993). We have marked the criminal history information that the district attorney must withhold under section 552.101 in conjunction with common law privacy.

Finally, the requested records also contain motor vehicle record information that you must withhold in accordance with section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from [required public disclosure] if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;

(2) a motor vehicle title or registration issued by an agency of this state; or

(3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

Gov't Code § 552.130(a). We have marked the motor vehicle record information that the district attorney must withhold under section 552.130.

In summary, the district attorney must withhold records relating to grand jury proceedings under section 552.101 in conjunction with article 20.02(a) of the Code of Criminal Procedure; criminal history record information under section 552.101 in conjunction with federal and state law, records relating to polygraph examinations under section 552.101 in conjunction with section 1703.306 of the Occupations Code; locally compiled criminal history information under section 552.101 in conjunction with common law privacy; and motor vehicle record information in accordance with section 552.130 of the Government Code. With those exceptions, the requested information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

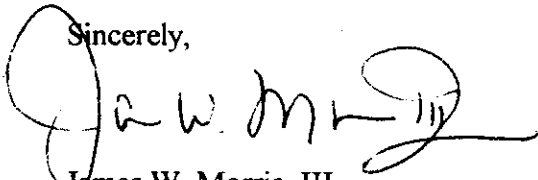
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J W Morris III", written over a horizontal line.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ljp

Ref: ID# 138659

Encl. Submitted documents

cc: Mr. James C. Tidwell
Wolfe, Clark, Henderson & Tidwell, L.L.P.
123 North Crockett Street, Suite 100
Sherman, Texas 75090
(w/o enclosures)